IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32 (2) (b)

Description of Case

Crl. Appeal No. 612 of 2001
(Old No. 1573 of 1989)

Date of decision :- 18.04.2006

A.F.R. (Approved for Reporting)

~~Not approved for reporting~~

Date:- 18-04-2006

Initials of Judge

Note:- Bench Reader will attach this at the top of the first page of the judgment when it is put before the Judge for signature.

HIGH COURT OF UTTARANCHAL AT NAINITAL

CRIMINAL APPEAL NO. 612 OF 2001
(Old No. 1573 of 1989)

Ram Pal Singh
S/o Shri Dilsukh
R/o Sultanpur Patti
P.S. Bazpur
District Nainital .....Appellant

Versus

State of Uttaranchal .....Respondent

Date :- 18th April, 2006

Mr. Dharam Veer Sharma learned counsel for the appellant.
Sri A. Rab learned Addl. GA assisted by Sri Rajeev Mohan learned A.G.A.

Hon'ble J.C.S. Rawat, J.

1) This criminal appeal has been filed against the judgment and order dated 18.07.1989 passed by Sri I.P. Singh, the then Sessions Judge, Nainital in S.T. No.228/1987, whereby the appellant was convicted and sentenced to undergo R.I. for a period of five years under section 307/34 IPC.

2) The prosecution case in a nutshell is that the appellant Rampal has stabbed Manoj Kumar about one year ago and a report in this regard was lodged with the police. Later on, the matter was amicably settled in between the parties after the intervention of the villagers. After some time, a written report (Ex.ka.1) was lodged on 21.7.1987 at police station Bajpur by Narain Das (PW1) alleging therein that he was present at his house in Sultanpur Patti at about 7:30am on 20.07.1987 when one Krishna Kumar, who was the resident of the same village, came to his house. He took his brother Manoj Kumar (PW2) for a walk towards Bandha (dam). When they reached near the field of sugarcane, the appellant alongwith two unknown

miscreants met there and caught hold of Manoj Kumar. During the course of incident, Krishna Kumar fled away from the scene of occurrence. Manoj Kumar knew the appellant since before. Thereafter, the appellant alongwith two unknown accused persons had taken him to the Kashere field where they had inflicted injuries with Pharsa on him. The injured also told that the assailants had left him on the spot assuming that he was dead. He, however, regained consciousness on the next morning and with considerable difficulty he came on the road from the Kashere field. It was further alleged that Narain Das informed the police outpost Sultanpur in this regard and under the escort of one constable from that police station, he brought his brother Manoj Kumar to the civil hospital Bazpur and an injury report (Ex.ka.10) was prepared. Thereafter, the police investigated the matter and submitted the chargesheet (Ex.ka.9) against the appellant and two unknown persons.

3) Charge was framed under section 307 read with section 34 IPC against the appellant and two other unknown miscreants. The appellant denied the charges and claimed the trial. At the time of charge, the accused Krishan Kumar was discharged by the trial court. The identify of the two unknown accused could not be established; therefore, they could not be tried by the trial court.

4) The prosecution in support of its case examined five witnesses. Narain Das (PW1), Manoj Kumar (PW2) and Tirkha (PW3) were the witnesses of the occurrence and the events subsequently thereto. Narain Das (PW1) was the brother of the injured. He was the

scribe of the FIR and he was informed about the incident by his brother Roop Kishore and on the information of his brother he lodged the report on the same day. Manoj Kumar (PW2) was the injured witness in this case. Tikha (PW3) has corroborated the testimony of the injured that he alongwith Roop Kishore met him on the road in the morning and the Roop Kishore arranged a 'tanga' for shifting the injured in the hospital for medical treatment. PW3 had stated that he was going to village Rampur on the date of incident to have a look at his grove situated in Ramjeewanpur. S.I. Ajai Kumar (PW4) was the Investigating Officer of this case. Dr. B.K.Saxena (PW5) has been examined to prove the injuries sustained by Manoj Kumar(PW2). He proved the injury report (Ex.ka.10). At about 10am on 21.7.1987 the Doctor found following 13 injuries on the person of the injured Manoj Kumar:-

(i) Incised would 9cm x 2cm x 2cm on the left side of forehead. 1.5cm above the left eye brow; coagulated blood present in the wound.

(ii) Incised wound 9cm x 1cm x bone deep on the skull. 8cm superior to injury no1, direction towards coronal plane.

(iii) Incised would 8cm x 1.5cm x bone deep on the skull, 3cm posterior to injury no.2 direction towards coronal plane.

(iv) Incised would 6cm x 1cm x bone deep on the skull, 3cm posterior to injury no.3 coagulated blood present in the wound.

(v) Incised would 7cm x 2.5cm x bone deep on the left forearm just above the writ extending from anterior to posteriorly on medial side, would protruding out.

(vi) Incised would 8cm x 2cm x bone deep on the left forearm, 2cm above injury no. 5.

(vii) Incised would 11cm x 5cm x bone deep on posterior aspect of right forearm just below elbow joint.

(viii) Incised would 5cm x 1.5cm x muscle deep on right arm in posterior aspect just above the elbow.

(ix) Incised would 5cm x 2cm x muscle deep on right arm in posterior aspect, 2cm above the injury no.8.

(x) Incised would 5cm x 2cm x muscle deep on the outer aspect of right shoulder.

(xi) Incised would 5cm x 2 cm x muscle deep on posterior aspect of right forearm, 8cm above the wrist.

(xii) Multiple incised would on palmer aspect of finders on right hand.

(xiii) Incised would 3cm x 0.5cm x skin deep on the front of right leg just above the ankle joint.

5) In the doctor's opinion all the injuries were caused by sharp edged weapon and the duration was 12 to 24 hours. The doctor kept the injuries under observation and advised X-ray of skull, left forearm, right forearm and arm. The radiological report (Ex.ka.11) was also

prepared. When the doctor proceeded to prove those reports the defence admitted the genuineness thereof. No defence evidence was produced before the court below.

6) In the statement recorded u/s 313 Cr.P.C. the appellant denied the prosecution case and stated that he has been falsely implicated in this case. No defence was adduced in support of the defence version.

7) The learned trial court after appraisal of the evidence on record found the appellant guilty and convicted and sentenced the appellant as mentioned above. I have heard the learned counsel for the appellant and learned A.G.A. and perused the evidence on record.

8) It is pertinent to mention here that it is not disputed that the injured Manoj Kumar (PW2) sustained injuries on the date of occurrence. PW2 has narrated the entire incident that he sustained the injuries on the date of incident. Dr. B.K.Saxena (PW5) has opined that all the injuries were caused by the sharp edged weapon and the duration was 12 to 24 hours. The doctor kept the injuries under observation and advised X-ray of skull, left forearm, right forearm and arm. The radiological report (Ex.ka.11) discloses that there were fractures on the frontal area of skull, lecranon process of ulna and shaft of ulna in the lower third region, in the lower end of radius and shaft of ulna and in lower third region. The supplementary report (Ex.ka.12) was based on the aforesaid findings in the report (Ex.ka.11) as a result of radiological examination.

9) Now, I have to consider whether the appellant Rampal Singh was responsible for the injuries sustained

by the injured Manoj Kumar. The prosecution has adduced the evidence of Manoj Kumar (PW2). He is the sole eye-witness of the incident. Now, it has to be seen whether the evidence of PW2 Manoj inspire confidence or not. PW2 had stated as has been indicated in para 2 of this judgment. The prosecution also adduced the evidence of Tirkha (PW3) to corroborate the factum that the injured met him in the morning at the Dam road on the date of incident. Roop Kishore was also with him. When they met the injured, the injured narrated the entire incident to both the persons. Thereafter, they arranged a 'tanga' and shifted on it to Sultanpur Patti.

10) Learned counsel for the appellant contended that the incident occurred at about 9pm on 20.7.1987. The injured and Krishan Kumar were going towards 'Dam' road. If the intention of the appellant would have caused the injury or to kill, he would have inflicted the injury on the dam road itself. It was pointed out that according to the prosecution the appellant and two unknown miscreants took the injured to the Kashere field where the injuries were inflicted upon him. It was further pointed out that 'Pharsa' was kept at the place of occurrence prior to the incident. There was no need to take the injured to the Kashere field and the injuries would have been caused at the dam road itself. Learned A.G.A. refuted the contention and contended that this is a hypothetical argument and the prosecution is not supposed to answer the hypothetical questions posed by the defence. It was further pointed out that this argument does not give the benefit of doubt to the appellant. The contention raised by the learned counsel for the appellant that as to why he did not cause the injuries at the dam road itself and why

he was taken to Kasera field is hypothetical and the answer to it would also be hypothetical. What is in the mind of a person and reason for doing a thing is an aspect within the special knowledge of the appellant. The prosecution is not supposed to meet every hypothetical question raised by the defence. If the prosecution is required to meet any fanciful plea, it would be a clear case of deflecting the course of justice. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence “of course it is possible, but not in the least probable,” the case is proved beyond reasonable doubt, but noting short of that will suffice. {**See Miller Vs. Minister of Pensions 1947 (2) All England Law Reports (AIIER) 372.** The credible and cogent evidence on record cannot be with the down by specious reasoning. Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicions and thereby destroy social defence. A reasonable doubt is not an imaginary trivial, but a fair doubt based upon commonsense. The hypothetical analysis of the story cannot be the ground of benefit of doubt to the appellant. The mental aptitude and the intentions which the appellant possess at the time of incident cannot be read by these fanciful or hypothetical inferences. Learned counsel for the appellant has relied upon a decision of the Allahabad High Court in **Swaminath & others Vs. State of U.P. reported in 2004(2) J.Cr.C.867** in which the court while hearing the appeal against acquittal found that there were various infirmities in the prosecution case. Inspite of

those infirmities, the Hon'ble Court was of the view why the accused who were armed with weapons did not assault the deceased at the house itself remained mystery. This fact was not side slipped with other infirmities of the case. The court did not interfere with the acquittal passed by the trial court. I have gone through the said decision and I am of the view that this ruling is not applicable in the present circumstances of the case. I do not find any substance in the argument advanced by the learned counsel for the defence.

11) Learned counsel for the defence pointed out that the statement of the injured was recorded by the doctor. The said statement had not been produced before the court below at the time of trial and the same has been concealed by the prosecution. It was pointed out that the injured had given a different version in that statement. As such, that statement was not put forward by the prosecution at the time of the trial. Learned counsel for the defence further relied upon the statement of Narain Das (PW1), who had stated that the doctor had recorded the statement of Manoj Kumar (PW2) at the hospital. Learned Addl. G.A. refuted the contention. PW1 has stated that the statement of the injured was recorded by the doctor. There is no mention or there is no cross examination as to whether the statement was oral or it was written. He had further stated the he and other were asked to go outside the operation theatre and thus in the presence of S.I. who was inside the operation theatre the doctor recorded the statement of the injured. It is clear from above statement that the said statement was not recorded in presence of Narain Das PW1. If he were outside the operation theater, then he would not be in

a position to say that the statement was recorded in his presence. The best evidence would be the I.O., injured-Manoj Kumar–PW2 and the doctor-PW5 who are said to have been present there. PW2 was specifically asked in this regard. PW2-Injured had stated that no statement was recorded by the doctor. Dr. B.K. Saxena (PW5) had also denied that he recorded the statement of the injured. PW4-Ajai Kumar (S.I.) had only stated that he had sent a massage to the S.D.M. kashipur for recording the dying declaration of the injured. The trial court had observed that the case dairy contains that such massage was sent. He had not stated in so many words that any such dying declaration was of the injured was in fact recorded. The I.O. had further stated that the doctor alone can tell as to whether any such statement was recorded by him or not. As such, the doctor as well as the injured Manoj Kumar PW2 had categorically denied that any statement was recorded. As such, no statement of the injured Manoj Kumar PW2 was recorded by the doctor. I do not find any force in the argument advanced by the learned counsel for the appellant.

12) Learned counsel for the defence further contended that the incident took place at about 9pm and the prosecution has not given the source of light for the identification of the appellant. It was further pointed out that it was a dark night and the incident took place at 9pm. It was contended that the appellant could not have been recognized in the dark night and as such the appellant is entitled to be acquitted on this score alone. Learned Addl. G.A. refuted the contention. It is admitted that Rampal-appellant was known to the injured since before. It is also significant that the

appellant can be recognized by his voice also. The parties are known to each other and as such there was no chance of making mistake about his identity. The appellant could be identified by voice and expressions. The appellant caught hold the injured and he was taken to the Kasera field where he was assaulted brutally and naturally in this process, the appellant was very close to the injured. During all this time, he had ample opportunity to closely see and identify the appellant. Apart this, the appellant was known to the injured since before. Thus, there is no reason at all for holding that the appellant could not be identified by the injured. Therefore, the contention advanced by the defence is not tenable.

13) The learned counsel for the appellant further contended that there are certain contradictions and exaggerations and embellishments in the testimony of the witnesses. First contradiction pointed by the defence was that PW2 Manoj Kumar had stated that on having been carried to the spot, where he was assaulted and injured he was made to smell some intoxicant by which he became unconscious. It was contended that the injured-Manoj Kumar PW2 had not however told all about the said intoxicant to his brother Roop Kishore or Tirkha PW3 on account of fear. He further claimed that he had told the I.O. all about that intoxicant. When the attention was drawn towards the statement recorded under section 161 Cr.P.C., it did not contain such statement and the injured could not offer any explanation. The second contradiction pointed out by the defence was that there was no sugarcane field adjacent to the Dam road and it was further pointed out that it was adjacent to ‘Kashere’

road with certain distance from the dam road. It was further contended that the witnesses had stated that the place of occurrence is on the right side of the road where the 'Kashera' field was situated, whereas the site plan shows that the 'Kashera' field was on the left site of the road where the incident took place. Learned Addl. G.A. refuted the contention. The site plan is only admissible with regard to the facts which had been seen by the I.O. in his own eyes and it cannot be considered as a substantive evidence. It can only be used as a corroborative piece of evidence. The prosecution has established the case beyond reasonable doubt by the evidence of the injured Manoj Kumar. The site plan prepared by the I.O. on the basis of statement made to him by the witnesses during the course of investigation who was the owner of the field adjoining to the place of occurrence and also showing the things on the hairs of the information would not be admissible in the evidence. In the case of **State of Rajasthan Vs. Bhawani & another 2003 (7) SCC (Cri) p/291,** the Apex Court has held as under:-

> *"11. The High Court has extensively relied upon the site plan prepared by the investigating officer for discarding the prosecution case and for this purpose has referred to the place from where the accused are alleged to have entered the nohara, the place from where they are alleged to have fired upon the deceased and also has drawn an inference that the place wherefrom the accused are alleged to have fired upon the deceased, the shot could not have hit the*

houses on the eastern side of the nohara. Many things mentioned in the site plan have been noted by the investigating officer on the basis of the statements given by the witnesses. Obviously, the place from where the accused entered the nohara and the place from where they resorted for firing is based upon the statement of the witnesses. These are clearly hit by section 162 CrPC. What the investigating officer personally saw and noted alone would be admissible. This legal position was explained in ***Tori singh Vs. State of UP AIR 1962 SC 399*** *in the following words: - "A rough sketch map prepared by the Sub-Inspector on the basis of statements made to him by witnesses during the course of investigation and showing the place where the deceased was hit and also the places where the witnesses were at the time of the incident would not be admissible in evidence in view of the provisions of section 162 CrPC, for it is in effect nothing more than the statement of the Sub-Inspector that the eyewitnesses told him that the deceased was at such and such place at the time when he was hit. The sketch map would be admissible so far as it indicates all that the Sub-Inspector saw himself at the spot; but any mark put on the sketch map based on the statements made by the witnesses to the Sub-Inspector would be inadmissible in view of the clear provisions of section 162 CrPC as it will be no more than a statement made to the police during*

investigation. Therefore, such marks on the map cannot be used to found any argument as to the improbability of the deceased being hit on that part of the body where he was actually injured, if he was standing at the spot marked on the sketch map.

12. Therefore, the findings recorded by the High Court on the basis of the site plan prepared by the investigating officer whereby it discarded the prosecution case is clearly illegal being based upon inadmissible evidence and has to be set aside."

14) Whereas the factum of being smelled intoxicants to intoxicant substance is concerned, it is merely a exaggeration and does not affect the prosecution story. It was further contended that PW2 Manoj Kumar had stated in his evidence that 'farsa' was used in the incident and he was assaulted by both sides of 'farsa'. It was pointed out that there is no lacerated would on the person of the injured. A witness may not stand the test of cross examination, which may be sometimes, because he is a bucolic person and is not able to understand the question put to him by the skilful cross-examiner and at times under the stress of cross-examination, certain answers are snatched from him. When a rustic or illiterate witness faces an astute lawyer, there is bound to be imbalance and, therefore, minor discrepancies have to be ignored. The observation differs from person to person and what one may notice, another may not. An object or moment might emboss its imagine on one person's mind whereas it might go unnoticed on the part of another.

By and large the people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. The injured person stands on a higher pedestal than the eyewitness. If the court comes to the conclusion that the evidence of the injured is cogent and credible it does not need any further corroboration by any other independent evidence. Manoj Kumar PW2, who sustained 13 injuries on his person during the course of incident, had no reason to involve innocent person in the commission of the crime. A person cannot accurately recall a conversation and reproduce the very words used by him or heard by him. He can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape-recorder. The witness cannot be expected to pose a photographic memory and to recall the details of an incident. It was only stated that the 'farsa' was used from both sides. It is not in the evidence that the said 'farsa' was sharp edged weapon on both sides or it was a blunt on the other side. But, I get it from the text books on Medical Jurisprudence that some of the lacerations caused by a blunt instrument could look like incised wounds if the blunt force is applied on the areas such as scalp. The following passages from Medical Jurisprudence and Toxicology (Seventh Edition) authored by HWV Cox and edited by Dr. P.C. Dikshit would clarify the position:

> *"The most common place for serious lacerations to be found, especially in forensic practice, is the scalp which is often the target for homicidal attack. As mentioned above, the hard underlying skull forms and unyielding base upon which the skin and soft tissues can be crushed, so that many blunt*

injuries of the scalp are indistinguishable at first sight from a laceration caused by a knife, sharp axe or any other cutting instrument."

Under the head Split Laceration, it is explained:-

"Splitting occurs by crushing the skin between two hard objects. They are also called incised looking wounds. When there is application of blunt force on areas where the skin in closely applied to the bone and sub-coetaneous tissue is scanty, the wounds are produced by linear splitting of the skin. The common areas are scalp, eyebrows and hibones. They can be differentiated by examining the margins by magnifying glass and in these cases the roots of hair are crushed."

15) Again, at the beginning of the Chapter V dealing with the wounds of the head, it is explained:-

"Blunt injuries to the scalp are classically confused with knife slashes, due to splitting of the tissues because of the firm underlying cranial bones beneath the aponeurosis. This has been described in the last chapter, but it should be repeated that the distinction between blunt splits and knife cuts may be difficult, but usually possible by a minute examination of the would margins."

16) The Modi's Medical Jurisprudence & Toxicology (22nd Edition) provides as under:-

"Incised looking wound:-

Occasionally, on wounds produced by a blunt

Weapon or by a fall, the skin splits and may look like incised wounds when inflicted on tense structures covering the bones, such as the scalp, eyebrow, iliac crest, skin, perineum etc., or by a fall on the knee or elbow when the limp is flexed. But the edges of such wounds will be found irregular with a certain amount of bruising, and small strands of tissues may be seen at the bottom bridging across the margins, if examined with a hand lens. In the case of wounds of the scalp, the hair bulbs will be found crushed, if they are inflicted with a blunt weapon, but will be found cut and forced into the wound, if produced by a cutting weapon like a heavy edged axe or a chopper."

In view of the above, I do not find any substance in the contention advanced by the defence.

17) Perusal of the injuries on the person of the injured reveals that he had sustained 13 injuries on his person. The injuries were found on his forehead, skull and different parts of the body. The places where the injuries had been caused or inflicted are the dense structured. If the wounds are inflicted on such portion of the body it would be difficult to distinguish those injuries as has been pointed out earlier. It is pertinent to mention here that when the injured was being assaulted he would not be in a position to see how the assaults were committed upon him. At the time of assaults, he concentrated only to save his life by any hook or crook. At the time of assault, he could not think that he would have adduced the evidence before

the court. He had to see how he was getting the assaults so that he might reproduce it before the court. In view of the above, the contention of the learned counsel for the defence has no force.

18) It was further contended that the prosecution has not produced Krishan Kumar as an independent witness because he was also with the injured where he was taken to Kashera field. It is pertinent to mention here that he was the co-accused in this case. Thereafter, he was discharged by the court. Prior to the submission of the chargesheet, he could not have been cited as a witness without he being made the approver of the prosecution. After his discharge, his evidence could have been procured by the prosecution. But, he could have only stated that he was with the injured and the appellant caught hold him and taken to some place and he fled away from there. He could not narrate how the incident occurred. The injured was the only witness who was present at the spot. The sole testimony of the injured witness is reliable and cogent and as such no other witness is required. It is not always necessary to multiply the evidence of the incident on the same point. It has to be seen what is the quality of the witnesses. It is the quality of the evidence and not the quantity, which is required. It is the evidence available on record is otherwise satisfactorily in nature and can be said to be trustworthy and increase in the number of witnesses cannot be turned up as the requirement of the case. If the prosecution establishes the guilt of the appellant beyond reasonable doubt, there is no need to produce the other evidence in the case. The evidence of the injured witness cannot be thrown outrightly on the ground that the other witness has not been

produced. If the witnesses are trustworthy then it is not required that there should be a multiplicity of evidence. **{See Komal and others Vs. State of U.P. 2002 SCC (Cri) 1600 and Babu Ram vs. State of U.P.; 2002 SCC (Cri) 1400}.** In the instant case, the prosecution witnesses have corroborated the evidence on material point and they have also corroborated the testimony on each material point.

19) It was further contended that Tirkha PW3 is a chance witness and he belonged to village 'tanda' which is situated about 4km away from the village Ram Jeewanpur. PW3 was going to Ram Jeewanpur to have a look at his grove. It was pointed out that during the cross examination PW3 had stated that he had no land in Ram Jeewanpur. He has not been cross examined whether he had grove or nor. The defence counsel tried to point out if the land is not there, then the grove of the witness would not be there. The evidence cannot be discarded on surmises and conjectures. It was pointed out that he had grove in the vicinity of Ram Jeewanpur. The defence has not put any question about the location of his grove. Nothing could be elicited from the evidence of Tirkha which could lead to take inference that his evidence is unbelievable. Thus the statement of Tirkha is credible and cogent.

20) Lastly, the defence has submitted that a lenient view may be taken with regard to the sentence. It was submitted that the appellant was 20 years of age at the time of incident and now he has five children. The appellant is a driver and if he is sent to jail his family would suffer in difficulty and there would be a chance of involving of the family members with the anti-social

elements to earn their livelihood. Considering the age of the appellant, the nature of offence and the circumstances of the case, I am of view that ends of justice would be met if the sentence is further modified and reduced to four years under section 307/34 IPC instead of five years.

21) The appeal is partly allowed. Conviction of the appellant under section 307/34 IPC is affirmed. The sentence is reduced to four years under section 307/34 IPC.

22) Let the record be sent back to the court concerned for compliance and report to be submitted within two months.

(J.C.S. Rawat, J.)

Dated 18.04.2006
LSR